IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO: H-01-3624**
v.	§	**AND CONSOLIDATED CASES**
	§	
ENRON CORPORATION, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT KENNETH L. LAY'S
BRIEF IN OPPOSITION TO
AMALGAMATED BANK'S REQUEST TO LIFT DISCOVERY STAY

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TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

Defendant Kenneth L. Lay, through counsel, respectfully submits this Brief in Opposition to Amalgamated Bank's Request to Lift the Discovery Stay.

I. INTRODUCTION

In her Memorandum Opinion and Order of January 8, 2002 (the "Order"), Judge Rosenthal denied Amalgamated Bank's ("Amalgamated's") request for a temporary restraining order against Defendant Kenneth L. Lay and 28 other current and former officers and directors of Enron Corporation "freezing" the proceeds from their sales of Enron securities from October 19, 1998, to November 27, 2001. The Court also found that the Private Securities Litigation Reform Act of 1995 ("PSLRA") stayed discovery "*until* the Court has determined the sufficiency of the Plaintiff's pleading, unless the Plaintiff can establish one of the exceptions." Order, p. 43 (emphasis in original). The Court, nevertheless, granted Amalgamated's request for an opportunity to establish an exception to the stay, directing Amalgamated to "explain[ ] what discovery is requested and why the request should be granted." *Id.* at 44.

Amalgamated argues that "particularized discovery is necessary . . . to prevent undue prejudice" to it and the putative class members it seeks to represent. *See* 15 U.S.C. § 78u-4 (Supp. 2001). The discovery it seeks, however, is neither necessary to prevent undue prejudice nor particularized. Indeed, if Amalgamated is permitted to conduct the discovery it wants and to continue these injunction proceedings, it will succeed in turning the PSLRA on its head. In a move directly antithetical to the fundamental purpose of the PSLRA, Amalgamated seeks to take not only merits discovery but also post-judgment discovery, all *before* the Court has appointed lead counsel, tested the adequacy of the pleadings, and determined whether and in what manner these actions may proceed as class actions -- in short, before the Court has considered and carefully ruled on the countless matters necessary to ensure that these consolidated cases proceed in an orderly and fair manner.

Based on nothing more than sheer speculation that Kenneth Lay might try to conceal assets in which some of the putative class members it seeks to represent might -- someday -- have an interest, Amalgamated asks this Court to permit extraordinarily broad and intrusive discovery into Kenneth Lay's financial affairs that would not even be available in an ordinary lawsuit, much less a case where Congress has mandated a stay of discovery pending a determination of the adequacy of the pleadings. Amalgamated's request for equitable relief is, in reality, a pretext for seeking post-judgment discovery impermissible at this stage of the proceedings, for obtaining discovery on the merits of its allegations, and for intruding improperly into Kenneth Lay's personal financial affairs.

In enacting the PSLRA's discovery stay, Congress cautioned that the exceptions were to be narrowly interpreted, citing as one permissible exception the need to depose a dying witness. *See S.G. Cowen Securities Corp. v. United States District Court for the Northern District of California*, 189 F.3d 909, 912 (9th Cir. 1999). The discovery sought by Amalgamated certainly is not narrowly targeted. Stripped of the fanciful references to pirates and buried treasure, the actual evidence on

which Amalgamated attempts to justify its request for discovery could be repeated in many, if not most, securities fraud cases.

In every securities fraud case, by definition, there is an allegation of securities fraud. In many such cases, there are allegations that financial statements were false or misleading and required restatement. In most, there are also claims that the individual defendants, officers or directors of the company at issue, sold stock in the company prior to the disclosure of the alleged fraud, thereby profiting from the fraud. In all, there are allegations that unsuspecting shareholders lost significant amounts of money.

Nevertheless, through passage of the PSLRA, Congress has decided that discovery shall not proceed until the Court has sustained the legal sufficiency of the complaint following the defendants' motions to dismiss. 15 U.S.C. § 78u-4(b)(3)(B) (2001). This discovery stay is mandatory and automatic. It applies in all securities fraud cases -- there is no exception for cases in which the alleged insider trading is of any particular magnitude[1] or the alleged losses are of any specified size. As Judge Rosenthal recognized during the hearing on Amalgamated's application for a temporary restraining order to freeze the assets of all of the individual defendants, this case is just like every other securities class action "in terms of the nature of the allegations and the sufficiency of the proof", only bigger. *See* December 7, 2001, Hearing Transcript ("Tr."), p. 99. If Amalgamated were entitled to the extraordinary discovery and the relief it seeks in this case, it would be difficult to deny the same

[1] The only evidence Amalgamated has presented to try to substantiate its claim of improper insider trading is that Enron executives and board members sold shares. This does not prove insider trading in violation of Sections 10(b) and 20A of the Securities Exchange Act of 1934. While Amalgamated has emphasized the amount of insider selling by Enron executives and board members, it fails to provide any evidence suggesting that the selling was unusual when compared with selling at comparable companies during the same three-year period (during the height of the bull market in technology stocks).

discovery and relief in many other cases. As a result, the PSLRA discovery stay would stay very little discovery.

Amalgamated asked the Court to take the extraordinary step of freezing -- pre-judgment and even pre-motion to dismiss -- the proceeds of stock trades by twenty-nine individuals who the plaintiffs have elected to sue for securities fraud. The Supreme Court has likened this type of equitable relief to a nuclear weapon; consequently, it has rarely been granted. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 328 (1999). At the hearing on Amalgamated's application for a temporary restraining order, Judge Rosenthal repeatedly emphasized that Amalgamated must make particular evidentiary showings as to each defendant rather than sweeping generalizations about the defendants as a group. Tr., pp. 7-8, 20, 32. Judge Rosenthal thereafter rejected Amalgamated's bold request, concluding:

> [T]the record does not support a temporary restraining order that would "freeze" the proceeds of three years of stock trades by the twenty-nine individuals whose roles and participation in Enron's financial matters varied, without allegations or evidence that each, or any, defendant has, or is likely to, conceal the stock sales proceeds or profits or place them beyond reach, absent immediate judicial intervention.

Order, p. 7. *See also*, Order, p. 39 (plaintiffs failed to plead and prove the facts demonstrating that "each defendant is likely to dissipate the assets that may satisfy the equitable remedies Amalgamated has asserted, absent intervention by this Court").

Having failed in its effort to effect a post-judgment seizure of the defendants' assets, Amalgamated requested an opportunity to brief the issue of whether it was entitled to seek discovery from the individual defendants in support of its quest to freeze assets, notwithstanding the automatic stay. As Amalgamated's counsel conceded at the December 7, 2001 hearing, even this request requires "extraordinary circumstances." Tr., p. 99. Despite its opportunity to present such

"extraordinary circumstances" warranting discovery, Amalgamated has failed to do so. For three reasons, Amalgamated's request for immediate discovery should be denied.

First, Amalgamated has not demonstrated that it will suffer undue prejudice if the mandatory stay is not lifted. Amalgamated's alleged prejudice is entirely hypothetical -- and exists in every case. Amalgamated posits, based on nothing more than sheer speculation, that the individual defendants might try to conceal assets in which some of the putative class members it seeks to represent hope to one day obtain an interest. There are no facts alleged, however, that support the contention that this risk is real or imminent. Indeed, virtually everything on which Amalgamated relies in support of its request was previously argued to, and rejected by, Judge Rosenthal.

Second, these requests are not particularized, as required by the PSLRA. In contrast, the discovery sought here is far-reaching. Amalgamated asks this Court to permit extraordinarily broad and intrusive discovery into the financial affairs of Kenneth Lay and his family. Rather than limiting discovery to documents or information regarding the alleged imminent secretion of assets, the discovery proposed seeks the production of documents relating to all compensation Mr. Lay received from any source for the last two and one-half years, all documents relating to any transactions in Enron stock, all documents relating to any outside entity in which Mr. Lay has had an interest, all tax returns filed in the last four years, and the identity of every legal, tax or financial professional whom Mr. Lay has "used" in the last eleven years.

Third, the requested discovery would not even be available in an ordinary lawsuit, much less a case where Congress has mandated a stay of discovery pending a determination of the adequacy of the pleadings. It simply should not be permitted.

II. ARGUMENT AND AUTHORITIES

A. The PSLRA Discovery Stay Precludes The Discovery Amalgamated Seeks.

The discovery stay provision of the PSLRA provides:

> In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the Court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B). Congress has explained the rationale underlying the discovery stay as follows:

> The Securities Subcommittee heard testimony that discovery in securities class actions resembles a fishing expedition. ... Accordingly, the Committee has determined that discovery should be permitted in securities class actions only after the Court has sustained the legal sufficiency of the class action complaint.

In re Grand Casinos, Inc. Sec. Litig., 988 F. Supp. 1270, 1271 (D. Minn. 1997), citing Senate Report No. 104-98, 104th Congress, Reprinted in 1995 U.S.C.C.A.N. 679, 693 (1995). Until the Court has an opportunity to test the sufficiency of the complaint, therefore, congressional intent is clear -- no discovery should commence. *In re Carnegie International Sec. Litig.*, 107 F. Supp. 2d 676, 681 (D. Md. 2000); *see also Novak v. Kasaks*, No. 96 Civ. 3073 (AGS), 1996 WL 467534, at *1 (S.D.N.Y. Aug. 16, 1996).

In addition to requiring a plaintiff to plead a legally sufficient complaint at the outset of the litigation, the PSLRA stay of discovery serves a second important purpose -- it preserves the court's ability to coordinate discovery if it should determine that the plaintiff's claims have been sufficiently pleaded. *In re CFS-Related Sec. Fraud Litig.*, 2001 WL 1682815, at *2 (N.D. Okla. Dec. 27, 2001). The importance of this goal to the litigation before this Court was highlighted at the January 30, 2002, hearing on Mr. Lay's emergency motion to enjoin certain parties and counsel from pursuing

relief in state court actions. At the hearing, counsel for defendants and plaintiffs alike spoke about the importance of coordinating proceedings, including discovery, relating to Enron shareholder claims. Amalgamated's current motion for expedited discovery is a somewhat more sophisticated attempt to achieve the same result sought by the lawyers who initiated the state court proceeding -- a chance to jump ahead of the orderly process established by the PSLRA of appointing a lead plaintiff and establishing the legal sufficiency of the plaintiffs' pleadings before discovery begins.

Congress provided relief from the PSLRA discovery stay only where *particularized* discovery is necessary: (1) to preserve evidence; or (2) to prevent undue prejudice. 15 U.S.C. § 78u-4(b)(3)(B) (emphasis added). Amalgamated has not met these criteria.

1. Amalgamated's Request to Lift the Discovery Stay Does Not Satisfy the Undue Prejudice Exception.

Amalgamated attempts to rely upon the "undue prejudice" exception to the discovery stay.[2] Amalgamated bases its claim of undue prejudice on its assertions that the defendants may someday secrete assets and discovery is necessary to determine whether the defendants have done so or are likely to do so sometime in the future. Amalgamated's support for this contention, is however, nothing more than a reiteration of the allegations and arguments previously rejected by Judge Rosenthal. Their conclusory allegations of potential and hypothetical harm are inadequate to establish undue prejudice under the PSLRA.

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[2] Amalgamated makes a passing reference to the preservation of evidence exemption. Amalgamated, however, cannot rely on this exemption because it has not demonstrated a specific threat that evidence in Mr. Lay's possession may be destroyed. *In re CFS-Related Sec. Fraud Litig.*, 2001 WL 1682815, at *3 (conclusory concerns and failure to demonstrate any particular threat that evidence would be lost or destroyed if discovery was not allowed is insufficient to establish the exemption).

The concept of undue prejudice is not defined in the PSLRA. Courts analyzing the exception have held that the discovery stay may be lifted if the defendants will be shielded from liability in the absence of the discovery. *See, e.g., Vacold LLC v. Cerami*, No. 00 Civ. 4024 (AGS), 2001 WL 167704, at *7 (S.D.N.Y. Feb. 16, 2001) (absence of limited discovery might "unfairly insulate defendants from liability for securities fraud"); *Medical Imaging Centers of America, Inc. v. Lichtenstein*, 917 F. Supp. 717, 721 n.3 (S.D. Cal. 1996). "Shielded from liability" does not mean, however, that the plaintiffs are given license to conduct overreaching discovery in a search to uncover facts sufficient to satisfy the PSLRA's pleading requirements.[3] *S.G. Cowen*, 189 F.3d at 912 (issuing writ of mandamus directing trial court to vacate its order granting plaintiffs' motion for leave to take limited discovery because to do so would contravene the purpose of the PSLRA's heightened pleading standard).

Although the Fifth Circuit has not opined on the showing necessary to lift the PSLRA discovery stay, in another context it has held that the PSLRA requires particularized facts to sustain a claim for relief and that conclusory allegations are inadequate. *See Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 411-12, 19-20 (5th Cir. 2001) (holding that, to state a claim under the PSLRA, plaintiffs must plead particularized facts supporting a strong inference of scienter). Courts that have directly addressed the issue of whether the discovery stay should be lifted have also required plaintiffs to plead facts, rather than unsupported speculation, in order to gain an exception to the discovery stay. *See,*

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[3] Amalgamated cites numerous cases in support of its request to lift the PSLRA stay that were decided prior to enactment of the PSLRA. Similarly, many of the cases cited by Amalgamated involve questions regarding whether certain information was discoverable during the ordinary course of discovery. *See, e.g., Melikian v. Corradetti*, 791 F.2d 274, 276 (3d Cir. 1986); *Abu-Nassar v. Elders Futures, Inc.*, No. 88 Civ. 7906 (PKL), 1991 WL 45062, at *1 (S.D.N.Y. Mar. 28, 1991); *Electromatic (PTY), Ltd. v. Rad-O-Lite of Philadelphia, Inc.*, 90 F.R.D. 182, 183 (E.D. Pa. 1981). Obviously, those case do not support Amalgamated's request for discovery in the face of the mandatory stay.

e.g., *In re CFS-Related Sec. Fraud Litig.*, 2001 WL 1682815, at *3 (holding that plaintiffs would not suffer undue prejudice as a result of discovery stay where they could not demonstrate a specific instance in which the loss of evidence was imminent as opposed to merely speculative); *In re Fluor Corp. Sec. Litig.*, No. SA CV 97-734 AHS EEX, 1999 WL 817206, at *3 (C.D. Calif. Jan. 15, 1999) (plaintiffs failed to make any showing that discovery was necessary to preserve evidence beyond generalized allegations of possible loss or destruction); *Novak*, 1996 WL 467534, at *1 (plaintiffs failed to satisfy their burden of showing that exceptional circumstances existed justifying a lifting of the discovery stay because they provided no evidence to bolster their wholly speculative assertions about the risk that evidence would be lost or destroyed).

Amalgamated has not presented this Court with any "particularized facts" that would justify lifting the discovery stay. In support of its motion, Amalgamated relies principally upon allegations that: (1) the defendants (apparently each and every one of them) are "adept" at structuring offshore entities; (2) the defendants conducted insider trading thereby; (3) Enron has illegally destroyed documents; and (4) as to Ken Lay, that his wife's comment that they are "fighting liquidity" equates with evidence of asset secretion. Each argument must fail.

First, Amalgamated's claim that Enron officers must be sophisticated in the ways of hiding their own assets because the company used off-shore partnerships is sheer speculation. Moreover, as Judge Rosenthal recognized, this leap in logic proves nothing. In the Order, Judge Rosenthal explicitly discussed Amalgamated's argument that the defendants "have evidenced their sophistication in managing offshore limited partnerships that obscured the true nature of certain financial transactions," and concluded that does not constitute "the necessary showing that the individual defendants will remove the assets from the reach of the plaintiffs, so as to cause irreparable injury absent an asset freeze." Order, p. 40. Anyone -- including Amalgamated and its counsel -- who reads the GAO report on money laundering, attached as Exhibit 4 to its supplemental brief, can become

well-versed in the techniques of secreting assets. Judge Rosenthal pointed out in the Order that many individuals and entities know how to conduct international financial transactions. Order, p. 41. Such knowledge -- even assuming Mr. Lay possesses it -- provides no evidence, however, that Mr. Lay or any other defendant is actually threatening to secrete assets. *See id.*

The fact that "certain defendants" allegedly engaged in "monetizing" their Enron shares and stock options (Karam Declaration, ¶ 5) is of no relevance here.[4] These transactions provide no evidence that Mr. Lay is attempting to conceal or dissipate his assets. Amalgamated claims the alleged transactions are relevant because they demonstrate that "Enron executives . . . engaged in complex derivative transactions with their personal assets." Karam Declaration, ¶ 7. But Judge Rosenthal concluded in her January 8, 2002 Order that, although "many individuals and entities" know how to conduct sophisticated international financial transactions, "that alone is not a sufficient basis for the relief sought." Order, p. 41. Similarly, in *National Credit Union Administration Board v. Concord Limousine, Inc.*, 872 F. Supp. 1174 (E.D.N.Y. 1995), the plaintiff argued that because defendants were closely held corporations, their assets could be transferred very easily. The court rejected that argument, stating: "Even if that is true, it demonstrates only that dissipation of the assets is possible, not that it is probable." *Id.* at 1178.

Second, allegations of insider trading and profits therefrom were all alleged in the complaint, argued in the original motion, and rejected as insufficient to support a temporary restraining order by Judge Rosenthal. *See, e.g.*, Order, pp. 3-4 ("Amalgamated also alleges that the individual defendants sold Enron stock between October 1998 and November 2001, while in possession of nonpublic information material to Enron's financial results.") Moreover, similar allegations exist in

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[4] Amalgamated's emphasis in its supplemental brief on derivative transactions and other non-public transactions is puzzling. By its own admission, any such transactions would be *private*. Yet Amalgamated purports to bring this motion on behalf of purchasers of Enron stock who bought shares in the *public* market.

many securities fraud cases. If the making of such allegations were sufficient to nullify the stay; it would cease to have any force or effect. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424 (3d Cir. 1997) ("A large number of today's corporate executives are compensated in terms of stock and stock options. It follows then that these individuals will trade those securities in the normal course of events."). By the same token, it cannot be that all one needs to do to circumvent the stay is pose questions regarding the current location of the money.

Third, Amalgamated asserts, as if it were established fact, that Enron has illegally destroyed evidence. For all its counsel's posturing, it has not submitted *any* sworn testimony based on personal knowledge substantiating its allegation that Enron has illegally destroyed evidence. More importantly, there is no evidence *or even allegation* in this case that Mr. Lay himself participated in, ordered, or was even aware of any document destruction.

Fourth, Staro Management, L.L.C. ("Staro") has sought leave to file a brief in support of the relief sought by Amalgamated and has alleged that Mrs. Lay's recent statements on a morning talk show regarding "fighting for liquidity" provide the necessary evidence of dissipation.[5] Staro Brief, p. 2. Staro claims that Mrs. Lay's remarks demonstrate that "considerable dissipation -- $300,000,000.00 -- has already occurred." That simply is not what Mrs. Lay said. She reportedly said, "Everything we had mostly was in Enron stock." Staro Brief, p. 2. At most, her comments suggest that the Lay family lost an enormous amount of money when the price of Enron stock

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[5] The Court should deny leave on the grounds that Staro does not have standing to seek the relief sought by Amalgamated, and that the transcript of Mrs. Lay's comments is inadmissible hearsay. Staro's lawyer represented to the Court at the January 30, 2002, hearing that Staro bought Enron debt securities and that it wishes to represent as lead plaintiff a subclass of purchasers of Enron debt securities. As Amalgamated seeks a constructive trust arising from alleged insider trading in Enron equity securities, Staro has no interest in the relief sought by Amalgamated. In addition, the hearsay statements of Mrs. Lay, who is not a party to this action, are not proper evidence in any event, even if attached to a declaration of plaintiff's counsel. *See* FED. R. EVID. 801, 802. Even if the Court were to consider Staro's proposed brief, it does not justify the discovery sought by Amalgamated for the reasons discussed above.

declined. This loss cannot in any way demonstrate an intent by Mr. Lay to frustrate collection of a potential future judgment.

Mrs. Lay's statement regarding many of their assets being for sale also does not provide any evidence of a threat of concealment or dissipation. *National Credit Union Administration Board,* 872 F. Supp. at 1177 (denying the requested freeze order because plaintiff proffered no proof that assets were sold "with the intent to defraud secured creditors"); *Local 397, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers v. Midwest Fasteners, Inc.*, 763 F. Supp. 78, 84 (D.N.J. 1990) (finding no indication that defendant had been attempting to consume, dissipate or fraudulently convey the assets in an attempt to move the assets beyond the reach of the court; rather, defendant was "adhering to its plan to effect an orderly liquidation and reduce its debt"); *Firemen's Ins. Co. of Newark, New Jersey v. Keating*, 753 F. Supp. 1146, 1153 (S.D.N.Y. 1990) (holding "no showing whatsoever" of irreparable injury based on plaintiff's allegations that "defendants' assets are subject to dissipation due to the risks of the current, unpredictable economic climate, defendants' payments to other creditors, gifts, poor business decisions, etc." and one defendant's statement that he had had his "financial resources . . . virtually devastated") (ellipses in original).

The case relied on by Staro, *United States ex rel. Rahman v. Oncology Associates, P.C.*, 198 F.3d 489 (4th Cir. 1992), involved uncontradicted allegations of transfers of assets out of the country to the Caribbean island of Nevis. Staro tries to equate Mrs. Lay's comments with the facts in *Rahman* by asserting: "Cash is a lot easier to wire overseas than a house in Aspen." Staro Brief, p. 2. But -- again -- this is nothing more than rank speculation.[6]

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[6] We received today as we were finalizing this brief the "Second Supplemental Brief in Response to the Court's January 8, 2002, Memorandum and Order Concerning Particularized Discovery" filed by Amalgamated and by the Regents of the University of California. They do not (continued...)

Lacking any real evidence at all, Amalgamated submits the affidavit of one of its lawyers, who alludes to unidentified information "provided to plaintiffs' counsel in the course of its investigating." Karam Declaration, ¶ 3. Amazingly, even though Amalgamated has resorted to relying on third- or fourth-hand information from "confidential" or "anonymous sources," which it candidly admits is not of "evidentiary reliability," it still has failed to articulate a single specific allegation that -- if proved -- would entitle it to the injunctive relief it seeks. None of these alleged "anonymous sources" have reported or suggested that Mr. Lay is moving assets to some off-shore account or is otherwise concealing or dissipating assets in an attempt to frustrate a potential future judgment.

Finally, Judge Rosenthal identified another fundamental flaw in Amalgamated's analysis -- the undue prejudice exception to the discovery stay speaks of shielding defendants from *liability*, not recoverability. *See* Tr., p. 93. (Responding to Mr. Lerach's statement that, absent discovery, the plaintiffs may be denied a recovery to which they are entitled, the Court inquired, "Aren't you alighting from liability to recoverability of damages?"). Otherwise, a plaintiff could circumvent the PSLRA's discovery stay in many cases simply by raising issues of collectibility at the outset before the adequacy of the pleading has even been reviewed.

2. Amalgamated's Discovery Requests Are Not "Particularized."

Amalgamated's request to lift the discovery stay suffers from another fatal flaw -- its requested discovery is not "particularized." *See Mishkin v. Ageloff*, 220 B.R. 784, 793 (S.D.N.Y. 1998) (denying relief from discovery stay because request for discovery was not particularized); *In re Grand Casinos*, 988 F. Supp. at 1271, citing Senate Report No. 104-98, 104th Congress (1995) ("Courts should stay all discovery pending a ruling on a motion to dismiss a securities class action,

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[6](...continued)
explain why they waited until the date this brief was due to serve a brief that addresses the same matters as Staro's brief filed over a week earlier. In any event, we will file a supplemental brief addressing this last-minute filing, if necessary.

except in the exceptional circumstance where particularized discovery is necessary . . . ."). Courts have refused to find that broad requests such as those propounded here are "particularized." *See, e.g.*, *Mishkin*, 220 B.R. at 793 ("[I]f [the particularity requirement] were satisfied by the degree of specificity urged by the Trustee, it would be rendered meaningless.").

To satisfy the particularity requirement, a discovery request must be narrowly tailored to seek only those documents that are necessary to prevent the "undue prejudice" underlying the lifting of the stay. *See, e.g.*, *Faulkner v. Verizon Communications, Inc.*, 156 F. Supp. 2d 384, 404 (S.D.N.Y. 2001) (investor's broad discovery request was not "particularized" as required by the PSLRA because, contrary to plaintiff's allegation, the information it sought was not limited to that which was probative of the limited issue purportedly supporting the request to lift the stay); *see also*, *Mishkin*, 220 B.R. at 794 (trustee's request for extensive discovery was not adequately particularized and the "unique circumstances" of the case did not warrant diluting the requirement); *Carnegie*, 107 F. Supp. 2d at 684 (defendants failed to demonstrate that their discovery was particularized because their discovery request was broad and not necessary to preserve evidence or prevent undue prejudice); *In re CFS-Related Sec. Fraud Litig.*, 2001 WL 1682815, at *3 (plaintiffs failed to demonstrate that their requested discovery, seeking documents relating to all aspects of defendant's relationship with another entity and underlying securities transactions, was particularized).

Discovery requests that are not limited to seeking documents relating to the issue purportedly supporting the request for lifting the stay are impermissible "fishing expeditions" designed to obtain evidence that can form the basis of a complaint. *See Carnegie*, 107 F. Supp. 2d at 680. Amalgamated's discovery is the opposite of "particularized". It encompasses every personal document of Mr. Lay that Amalgamated would have an interest in obtaining at any stage of this proceeding from the outset through post-judgment collection. As such, it is impermissible and should not be allowed to proceed.

While Amalgamated represents in its supplemental brief that its proposed discovery is targeted at locating current accounts allegedly holding proceeds from sales of Enron stock by Mr. Lay and the other officers and directors, it seeks an extraordinarily broad and comprehensive amount of personal financial information for the time period from October 19, 1998, through the date of production. For example, the document requests seek:

- All documents concerning the salaries, bonuses, stock, derivatives, or any other payments or compensation You received from Enron, LJM Cayman, LP, LJM2 Co-Investment L.P., Chewco Investments, L.P., Raptor, Condor, or Joint Energy Development Investments Limited Partnership, or any other off-shore partnerships, and the identification of each person Enron treated as a partner or director in a Special Purpose Entity for accounting purposes (Document Request No. 2);

- All documents, including partnership agreements, bank statements, signature cards, and transfer records, concerning each non-public corporation, partnership (limited or otherwise), trust, entity or person, in which You (i) are or were an officer, director, partner, limited partner, trustee or principal; (ii) have or had any beneficial interest; or (iii) from which You received any compensation, payment, commission, or other remuneration (Document Request No. 6);

- All personal federal income tax returns and related schedules for the tax years 1997 to the present, and all such returns and schedules filed by any trust, partnership, limited partnership, corporation, association, or other entity in which You are or were an officer, director, partner, limited partner, trustee, principal, or other controlling or participating party, and any schedules reporting income from non-United States sources (Document Request No. 7); and

- Documents sufficient to identify any and all attorneys, accountants, tax professionals, brokerage firms or financial advisors used by You or Your current or former spouse *between January 1, 1990 to [sic] the present* (Document Request No. 9).

It is difficult to understand how the plaintiffs could contend that these requests are targeted to tracing and identifying proceeds from sales of Enron public-traded securities by Mr. Lay.

Amalgamated's remaining documents requests and interrogatories are equally broad and intrusive. Taken as a whole, they seek all the information that Amalgamated might be interested in gathering from Mr. Lay *if merits discovery were wide open*. It is difficult to conceive of any other documents or information belonging to Mr. Lay (as opposed to Enron) that have *not* been sought in Amalgamated's supposedly "particularized" discovery. The broad scope of Amalgamated's discovery requests confirms that its proffered discovery is designed to capture much more than information identifying the location of assets allegedly representing the proceeds from Mr. Lay's stock sales. This is, no doubt, because Amalgamated's true purpose is to discover information it can use to cure its underlying pleading deficiencies.[7]

B. Amalgamated Seeks Discovery Not Permissible Even If the PSLRA Stay Were Not in Effect.

Even aside from the protections provided by the PSLRA, Amalgamated simply has not demonstrated its entitlement to what is -- in effect -- post-judgment asset discovery. Before Amalgamated has produced a single piece of *competent evidence* demonstrating any wrongdoing by Mr. Lay or the other defendants, it seeks to jump forward to conduct what is in effect post-judgment discovery regarding the assets of Mr. Lay and the other defendants, as well as the assets of their minor children, spouses, and even -- astoundingly -- any former spouses.

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[7] A brief look at Amalgamated's requests reveals the real reason it seeks such broad discovery at this point in the litigation is that its scienter allegations against Mr. Lay will not survive a motion to dismiss under the recent Fifth Circuit decision of *Nathenson v. Zonagen, Inc.*, 267 F.3d 400 (5th Cir. 2001) (explaining that "the [PSLRA] requires that the necessary strong inference of scienter must arise from "facts" stated in the complaint "with particularity"). Conclusory allegations of intent do not suffice. *Id.* at 419-20. Given Amalgamated's lack of any particularized facts regarding scienter, it is no wonder it desperately seeks this discovery at this stage -- before Mr. Lay's motion to dismiss. But to allow it would completely circumvent the procedural rules expressly designed to prevent this type of abuse.

The Federal Rules of Civil Procedure do not permit pre-trial discovery of a defendant's finances, except in certain circumstances not present here. *Pinkert v. Olivieri*, No. Civ. A. 99-380-SLR, 2001 WL 641737, *7 (D. Del. May 24, 2001)[8]; *Ranney-Brown Distib., Inc. v. E.T. Barwick Indus., Inc.*, 75 F.R.D. 3, 4 (S.D. Ohio 1977); *Bogosian v. Gulf Oil Corp.*, 337 F. Supp. 1228 (E.D. Pa. 1971); *U.S. v. General Electric Co.*, 158 F.R.D. 161, 164 (D. Oregon 1994). Moreover, the income tax records Amalgamated seeks are considered "highly sensitive," and courts are reluctant to order their routine disclosure as part of discovery. *Natural Gas Pipeline Co. of Amer. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1411 (5th Cir. 1993). "Not only are the taxpayer's privacy concerns at stake, but unanticipated disclosure also threatens the effective administration of our federal tax laws given the self-reporting, self-assessing character of the income tax system." *Id.* For that reason, "[p]ublic policy favors the nondisclosure of income tax returns." *DeMasi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982); *see also, Gattegno v. PricewaterhouseCoopers, LLP*, 204 F.R.D. 233, 235 (D. Conn. 2001).

The pre-PSLRA cases cited by Amalgamated purportedly supporting its request for discovery are inapplicable because they do not deal with the factual scenario presented here -- post-judgment asset discovery before plaintiff has demonstrated it has a viable claim.[9] None of the cases cited by

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[8] The *Pinkert* court noted that asset discovery could be allowed where there exists a triable issue for punitive damages or where permitted by statute. *Id.* at *7.

[9] The majority of the cases cited by Amalgamated on page 8 of its supplemental brief concern discovery relating to the merits of claims in the lawsuit, not to a defendant's ability to satisfy a potential future judgment. *See, e.g., Melikian*, 791 F.2d 274 (reversing the district court's granting of a motion to dismiss and allowing discovery to proceed on merits of Plaintiffs' attempt to "pierce the corporate veil"); *Electromatic,* 90 F.R.D. at 183-84 (discovery went to the merits of Plaintiffs' "claim that various corporate and associational entities should be disregarded and treated as a single entity, and that the various entities are merely the alter egos of the individual defendants"). *Kippur*

(continued...)

Amalgamated authorizes this type of invasive financial discovery in the absence of *any evidence* that assets are being concealed or dissipated. *See, e.g., Melikian v. Corradetti*, 791 F.2d 274, 282 (3d Cir. 1986) (allowing discovery on merits of plaintiffs' claims after holding motion to dismiss should not have been granted); *Abu-Nassar v. Elders Futures, Inc.*, No. 88 Civ. 7906 (PKL), 1991 WL 45062, at *16 (S.D.N.Y. Mar. 28, 1991) (allowing discovery regarding plaintiff's alter ego claim only after finding party had "proffered sufficient evidence to make out a *prima facie* case for piercing Infovest's corporate veil and imposing personal liability on plaintiffs"); *Merrill Lynch Futures, Inc. v. Kelly*, 585 F. Supp. 1245, 1248-49, 1260 (S.D.N.Y. 1984) (allowing some expedited discovery only after evidence demonstrated that "sufficient questions have been raised regarding the conduct of all defendants" to justify such discovery); *Electromatic*, 90 F.R.D. at 184 ("mere allegation . . . would be insufficient to support discovery of the financial information sought here by Electromatic", although discovery allowed because there were admissions by defendants and other uncontested evidence).

As stated very clearly in one of the cases cited by Amalgamated, if the party seeking discovery is unable to make out a "*prima facie* showing, through affidavits or other means, to support [its] claim," then the "request for discovery is therefore nothing more than a 'fishing expedition' which would needlessly delay the proceeding." *Abu-Nassar*, 1991 WL 45062, at *16. Here, in order to make a prima facie showing to support its claims for an injunction freezing certain assets of Mr. Lay, Amalgamated would have to demonstrate, among other things, that it would be irreparably harmed

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(...continued)
v. Bernstein, 1991 U.S. Dist. LEXIS 9230 (S.D.N.Y. June 10, 1991), concerns the proper scope of pre-trial discovery concerning alleged dissipation, but it does not address the factual basis upon which the Court had originally permitted such discovery.

in the absence of the requested relief. This, in turn, would require a showing that Mr. Lay intends to frustrate the collection of any future judgment on the merits by making it uncollectible. *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 85, 87 (2d Cir. 1996) (finding such intent based on certain transfers that were made "without fair consideration" at a time when debtor "was or would be thereby rendered insolvent"). Judge Rosenthal originally denied Amalgamated's request for injunctive relief in her January 8, 2002 Order stating:

> In the cases in which such a prejudgment asset-freezing injunction is granted, the courts have been presented with allegations and evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of post-judgment collections, or were dissipating the assets.

Order, pp. 7, 38.[10] As demonstrated above, Amalgamated has utterly failed to make the requisite showing.

III. CONCLUSION

Amalgamated's argument in essence is that it cannot demonstrate it is entitled to the discovery it seeks without getting the discovery it seeks. As Judge Rosenthal pointed out, however, "If that's right, it would apply in every case." Tr., p. 98. Amalgamated's counsel conceded the extraordinary nature of the relief it seeks at the December 7, 2001 hearing:

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[10] Order (citing *United States ex rel. Rahman v. Oncology Associates, P.C.*, 198 F.3d 489, 493 (4th Cir. 1999) (uncontradicted allegations that defendants had transferred assets to Caribbean Island and were selling main assets of the corporation); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 291 (1940) (defendant insolvent and giving preference to foreign creditors seeking payment); *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669 (S.D. Fla. 1988) (defendants attempting to transfer assets of national airline to illegitimate government of Panama, putting the assets outside the reach of the court); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (upholding asset freeze based on allegations that defendants had internationally transferred personal assets and had used false identities to transfer assets to a Liechtenstein trust, using Swiss banks, for their benefit)).

> [N]o district court is going to permit everybody in every [securities fraud] case to walk in and say, boo-hoo, I might not recover some day, let me start doing discovery on defendants notwithstanding the discovery stay. It's got to be limited to extraordinary circumstances.

Tr., p. 99. But as Judge Rosenthal pointed out, there is nothing materially different about the allegations in this case that would warrant diverging from the rules that govern every other case alleging securities fraud. Tr., pp. 99-100. Having been given a second chance to provide evidence of the requisite "extraordinary circumstances," Amalgamated has failed to submit any new evidence of any probative value to justify its requested discovery.

WHEREFORE, Defendant Kenneth Lay requests that the Court deny Amalgamated Bank's request to lift the discovery stay.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of Civil Procedure, on this 8th day of February, 2002.

Ponce Collins